No. 18-966

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Petitioner,
v.
STATE OF NEW YORK, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch is committed to the enforcement of the National Voter Registration Act ("NVRA"). Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to its enforcement. *See, e.g., Judicial Watch, Inc. v. Logan*, No. CV-17-8948-R, 2018 U.S. Dist. LEXIS 151333 (C.D. Cal. Sep. 5, 2018) (NVRA Section 8 lawsuit against the State of California); *Judicial Watch, Inc. v. Grimes*, No. 3:17-cv-94, 2018 (E.D. Ky. Nov. 14, 2017) (NVRA Section 8 lawsuit against the State of Kentucky); *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012) (NVRA Section 8 lawsuit against the State of Indiana).

The Allied Educational Foundation ("AEF") is a 501(c)(3) nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its

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[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amici* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch sought and obtained the consent of all parties to the filing of this *amicus* brief more than ten days prior to the date it was due.

purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Together, *amici* share an interest in the enforcement of the NVRA. *Amici* believe that including a citizenship question on the decennial census would materially assist in the enforcement of Section 8 of the NVRA. *Amici* urge this Court to grant the petition for a writ of certiorari before judgment.

SUMMARY OF ARGUMENT

Citizenship data is critical to the enforcement of Section 8 of the National Voter Registration Act of 1993 ("NVRA"). The first step in investigating compliance with Section 8 is to compare the number of voter registrations that a jurisdiction admits to with the number of citizens in that jurisdiction who are old enough to vote. Where the resulting registration rate is high—and certainly where it exceeds 100%—there is a good basis for believing that the voter rolls contain a significant number of outdated or ineligible registrations. The relevance of this approach has been acknowledged by private litigants, by the Department of Justice, and by federal courts.

Adding a citizenship question to the decennial census would generate a massive amount of new data concerning the numbers of citizens and noncitizens in U.S. states and counties. To quibble about potential limitations in the data that would be collected is to miss the point. It cannot be the case that we are somehow better off with *less*

information. The mountain of new data generated by the decennial census question will assist private litigants and the Department of Justice in their efforts to enforce the NVRA. Indeed, this data will overcome limitations identified by a federal court concerning the current data on citizenship from the American Community Survey.

Amici respectfully submit that, unless the Court acts now, the enforcement of Section 8 of the NVRA will be materially impaired for the next ten years.

ARGUMENT

I. Citizenship Data Is Critical to the Efforts of Private Parties Like Judicial Watch to Enforce Section 8 of the NVRA.

Amicus Judicial Watch interprets its core mission of promoting accountability, transparency and integrity in government and fidelity to the rule of law to include the pursuit of election integrity. Toward this end, Judicial Watch has an active program to enforce the voter list maintenance provisions of the NVRA.

Section 8 of the NVRA requires each state to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . the death of the registrant; or . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4). It also provides for removals "at the request of the registrant," or under a state law concerning a

disqualifying "criminal conviction or mental incapacity." *Id.*, § 20507(a)(3). Private parties may sue to enforce the NVRA. *Id.*, § 20510(b).

Judicial Watch's efforts to enforce Section 8 begin anew in June of each odd-numbered year, when the U.S. Election Assistance Commission ("EAC") is required by law to release a report regarding state voter registration practices. 52 U.S.C. § 20508(a)(3). The EAC report is based on a state-by-state survey of voter registration practices and statistics. Federal regulations require states to provide information responsive to this survey. 11 C.F.R. § 9428.7.

Judicial Watch compares the EAC's survey results to data from the American Community Survey ("ACS") to determine whether states or counties have excessive registration rates, which may indicate that their voter rolls contain significant numbers of ineligible registrants. Judicial Watch is particularly interested in identifying jurisdictions that have more voter registrations than resident citizens of voting age—in other words, registration rates exceeding 100% of those who lawfully *could* register and vote. Although any registration rate higher than national or historical averages is noteworthy, registration rates greater than 100% are intuitively understood to be excessive, by courts, by the public, and even by states and counties, which hesitate to defend them.

In such a study it is important to compare registration rates to the *citizen* voting-age population ("CVAP"). Relying on voting-age

population ("VAP") instead, without qualifying for citizenship, is inadequate. VAP includes noncitizens over the age of 18 who cannot lawfully register or vote. Because VAP is a larger denominator, comparing the number of voter registrations to VAP makes high registration rates appear lower, and hence more reasonable, than they are.

In both 2015 and 2017, following the release of the EAC's biennial report, Judicial Watch hired a professional demographer to compare the number of registrations to the CVAP in every county and state covered by the NVRA for which registration data was available.[2] The results of these studies strongly suggest that there is a need for better enforcement of Section 8 of the NVRA. Judicial Watch's last study in 2017, for example, revealed that 462 U.S. counties—about one out of every six counties where data was available—had voter registration rates exceeding 100% of the age-eligible citizenry.[3]

After reviewing the results of these studies, Judicial Watch sends letters to states and counties notifying them of potential violations of Section 8 and seeking further information about their list maintenance practices. Following their 2017 study, Judicial Watch sent such notice letters to 12 states

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[2] Judicial Watch plans to repeat this study when the new EAC report is release in June 2019.

[3] Robert D. Popper, Testimony before the Presidential Advisory Commission on Election Integrity (Sep. 12, 2017), available at https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-written-statement-robert-popper.pdf.

containing 114 counties with registration rates exceeding 100%.[4] Where responses to such letters are deemed inadequate, Judicial Watch will commence a private lawsuit to enforce Section 8.

The citizen registration rate constitutes an important fact in any lawsuit. Judicial Watch's complaints typically include allegations that voter registrations exceed CVAP. *See* Complaint at 7, ¶ 26, *Judicial Watch, Inc. v. Logan*, No. CV-17-8948-R, (C.D. Cal. Dec. 13, 2017), ECF No. 1 ("according to data provided to and published by the EAC, Los Angeles County has a registration rate of 112% of its adult citizen population."); *id.*, ¶ 27 ("The entire State of California has a registration rate of about 101% of its age-eligible citizenry."); Complaint at 5, ¶16-17, *Judicial Watch, Inc. v. Grimes*, No. 3:17-cv-94 (E.D. Ky. Nov. 14, 2017), ECF No. 1 ("the number of voter registrations exceeds the number of age-eligible citizens in 48 Kentucky counties, or 40% of all Kentucky counties"). The Department of Justice makes similar allegations in its own Section 8 complaints. *See* Complaint at 6, ¶ 17, *U.S. v. State of Maine*, Case 1:06-cv-86-JAW (D. Me. July 28,

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[4] Press Release, Judicial Watch, Judicial Watch Warns California to Clean Voter Registration Lists or Face Federal Lawsuit (Aug. 4, 2017) (available at https://www.judicialwatch.org/press-room/press-releases/judicial-watch-warns-california-clean-voter-registration-lists-face-federal-lawsuit/); Press Release, Judicial Watch, Judicial Watch Warns 11 States to Clean Voter Registration Lists or Face Federal Lawsuit (Apr. 11, 2017) (available at https://www.judicialwatch.org/press-room/press-releases/judicial-watch-warns-11-states-clean-voter-registration-lists-face-federal-lawsuit/).

2006), ECF No. 1 ("In over half of Maine's 503 voting jurisdictions, the number of registered voters exceed the number of citizens of voting age."). Federal courts have recognized that such allegations form part of a valid claim for a violation of Section 8. *See Am. Civ. Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 793 (W.D. Tex. 2015) (upholding denial of motion to dismiss NVRA complaint alleging, among other things, that "voter rolls maintained by the Defendant contain more voters registered to vote than there are citizens eligible to vote"); *Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, 301 F. Supp. 3d 612, 618 (E.D.N.C. 2017) (denying motion to dismiss where complaint alleged voter rolls contained "more registrants than eligible voting-age citizens").

Judicial Watch's program to enforce Section 8 has achieved notable successes. Judicial Watch remains the only private litigant to enter into a statewide settlement agreement to enforce Section 8 of the NVRA, which it has done three times, in Ohio, Kentucky, and California (also settling with Los Angeles County). Joint Stipulation of Dismissal, *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792-EAS-TPK (S.D. Oh. Jan. 13, 2014), ECF No. 24[5]; Consent Judgement, *Judicial Watch, Inc. v. Grimes*, No. 3:17-cv-94 (E.D. Ky. July 3, 2018), ECF No. 39; Plaintiffs' Notice of Final Settlement & Settlement Agreement,

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[5] The text of the Ohio settlement agreement is available here: *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792-EAS-TPK (S. D. Oh. Jan. 13, 2014), *available at* https://www.scribd.com/document/198544915/OH-Final-Agreement-Signed-by-JC-Ohio.

Judicial Watch, Inc. v. Logan, No. CV-17-8948-R (C.D. Cal. Dec. 13, 2017), ECF Nos. 96, 96-1. In addition, a Judicial Watch lawsuit against Indiana became moot by virtue of the State's list maintenance efforts during the course of the lawsuit. *See* Plaintiffs' Motion for Voluntary Dismissal With Prejudice, *Judicial Watch, Inc. v. King*, No. 1:12-cv-800-WTL-TAB (S.D. Ind. June 3, 2014), ECF No. 90.

While effective, Judicial Watch's Section 8 program is costly. The demographic study Judicial Watch sponsors every other year costs thousands of dollars. NVRA lawsuits are fact- and witness-intensive. Judicial Watch paid for expert reports in Ohio and Indiana. In California, Judicial Watch retained three experts in anticipation of trial, reviewed tens of thousands of pages of documents produced during discovery, and, at the time the case was settled, had filed a motion for leave to take up to 30 fact depositions. *See* Plaintiffs' Notice of Motion and Motion for Leave to Take Additional Depositions, *Judicial Watch, Inc. v. Logan*, No. CV-17-8948-R (C.D. Cal. Aug. 14, 2018), ECF No. 83.

Judicial Watch's investment in enforcing the NVRA is considerable. Notwithstanding the expense, however, the program is necessary. Judicial Watch's biennial studies concerning national registration rates regularly show widespread noncompliance with Section 8. More data regarding citizenship rates would ensure that money and time are used most efficiently to enforce Section 8. Including a citizenship question on the decennial census would help to provide such data to

potential Section 8 plaintiffs, including Judicial Watch.

II. A Citizenship Question On the Decennial Census Would Improve the Quality of Available Data.

As Petitioners point out, the Department of Justice stated that citizenship data was "critical" to its efforts to enforce Section 2 of the Voting Rights Act and that the decennial census was "the most appropriate vehicle" for asking a question about citizenship. Cert. Pet. 3. The Secretary of Commerce agreed. *Id.* at 4.[6] In so acting, the Secretary rejected the argument that including a citizenship question would reduce the response rate for noncitizens. *Id.* The Secretary found that the

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[6] The Department is unquestionably correct that, as a matter of law and practice, CVAP data is critical to enforcing Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. *See Bartlett v. Strickland*, 556 U.S. 1, 9 (2009) (plurality opinion) (upholding North Carolina Supreme Court's determination that plaintiffs did not meet the preconditions for a vote-dilution claim under Section 2 where their minority group did not "constitute a numerical majority of *citizens of voting age*" in a proposed district), quoting *Pender County v. Bartlett*, 361 N.C. 491, 507 (N.C. 2007) (emphasis added); *see also* Complaint at 4, ¶ 18, *United States of America v. Eastpointe*, No. 1:06cv86 (E.D. Mich. Jan. 10, 2017), ECF No. 1 (Department's latest Section 2 complaint alleging that the "black community of Eastpointe is sufficiently numerous and geographically compact to constitute a majority of the citizen voting-age population in one single-member district"). Accurate citizenship data is also vital in enforcing the language-minority provisions of Section 203 of the Act, which may apply where 5% or 10,000 of a jurisdiction's "citizens of voting age" are "limited-English proficient." 52 U.S.C. § 10503.

available data did not support this suggestion, and added that the value of "more complete and accurate" citizenship data outweighed the disadvantages that might arise from a lower response rate. *Id.*

Petitioners have pointed out that a determination about what to include on a census questionnaire is committed to agency discretion and is unreviewable under the Administrative Procedures Act ("APA"). Cert. Per. 19. They also note that a court determining whether an agency action is arbitrary and capricious under the APA may not substitute its judgment for that of the agency. *Id.* at 21. *Amici* join in these arguments.

But *amici* also submit that the Secretary's judgments were surely correct. The decennial census generates an enormous number of responses. In the last census, "74 percent of households in the United States filled out and mailed back their 2010 Census questionnaire."[7] The "47 million households that did not mail back a census form by the deadline were visited by census takers in person," and, ultimately, the "Census Bureau either received a form or attempted repeated visits to 100 percent of the identified housing units in the country."[8] *Id.*

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[7] Press Release, U.S. Census Bureau, Nation Achieves 74 Percent Final Mail Participation in 2010 Census (Oct. 21, 2010) (available at https://www.census.gov/newsroom/releases/archives/2010_census/cb10-cn81.html).

[8] *Id.*

At present, Judicial Watch relies for its citizenship data on the American Community Survey, which is just that—a yearly survey of about "3.5 million households across the country."[9] Data from the ACS is broken down into 1-year estimates "for geographic areas with populations of 65,000 or more," and 5-year estimates "[f]or geographic areas with smaller populations."[10]

Enlarging the available citizenship data with many tens of millions of additional data points from the decennial census must be to the great benefit of everyone who relies on that information. All data, of course, has limitations, which must be understood and accounted for. To suggest, however, that possible limitations concerning such a vast quantity of new data means that it should never be collected in the first place is wrong-headed. It involves the curious assumption that we are somehow better off with less data. Indeed, it betrays a lack of faith in the scientific method. This new data, properly understood, should provide a wealth of information about citizenship rates in the United States. But it will also be useful in ways we do not now anticipate. If nothing else, it will be useful to compare this data with that from the ACS and other sources to see

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[9] Top Questions About the Survey, U.S. Census Bureau, https://www.census.gov/programs-surveys/acs/about/top-questions-about-the-survey.html (last visited Feb. 11, 2019).

[10] U.S. Census Bureau, Understanding and Using American Community Survey Data: What All Data Users Need to Know 13 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/acs_general_handbook_2018.pdf.

whether, and how, they corroborate or conflict with one another.

In addition, data from the decennial census would address specific concerns about ACS data that have been raised in federal court. In *Bellitto v. Snipes*, No. 16-cv-61474-BLOOM/Valle, 2018 U.S. Dist. LEXIS 103617 *29-30 (S.D. Fla. March 30, 2018), the district court expressed concern that the ACS "excludes individuals living overseas . . . college students . . . as well as other seasonal residents registered in Broward County." Because the decennial census will be sent to every household, it will be more likely to reach college students or seasonal residents wherever they reside. The decennial census also includes a particular program, the "Federally Affiliated Count Overseas (FACO) Operation" which "obtains counts by home state of U.S. military and federal civilian employees stationed or assigned overseas and their dependents living with them."[11] As frequent litigants in NVRA cases, *amici* naturally would like to present the best possible data to federal courts. They could avoid the criticisms of the ACS raised in *Bellitto* by presenting census data.

For all of these reasons, the citizenship question should be included on the decennial census.

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[11] 2020 Census Operational Plan 135 (Dec. 2018) (available at https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan4.pdf).

III. The Court Should Grant the Petition and Rule in Time to Allow the Citizenship Question to be Included in the 2020 Census.

Judicial Watch respectfully submits that the Court should grant the petition in order to permit the resolution of this controversy prior to June 2019. Simply put, if the petition is denied, Judicial Watch and other private litigants will be compelled to rely on the limited data collected by the ACS for the next ten years. This would impair the private enforcement of Section 8 of the NVRA, compared to what could have been achieved with more complete data, for the next decade.

CONCLUSION

For the foregoing reasons, *amici* Judicial Watch and AEF respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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